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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 767

CLARENCE SMALDONE, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF COLORADO, *Respondent.*

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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INDEX

PAGE

Prefatory Statement 1

Supplemental Statement 2

Argument 4

Conclusion 8

TABLE OF CASES

Benedict v. People, 23 Colo. 126, 46 P. 437 (1896)..... 7

Cramp v. Bd. of Public Instruction, 368 U. S. 278, 7 L.Ed. 2d 285, 82 S.Ct. 275 (1961)..... 7

Davis v. People, 112 Colo. 452, 150 P.2d 67 (1944)..... 7

In Re Oliver, 333 U. S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948) 6

Parrott v. People, 144 Colo. 587, 357 P.2d 634 (1960)..... 7

Phelps v. People, 152 Colo. 467, 382 P.2d 995 (1963)..... 7

Quinn v. U. S., 349 U. S. 155, 99 L.Ed. 964, 75 S.Ct. 668 (1954) 4

Thompson v. People, ... Colo. ....., 399 P.2d 776 (1965) 7

TEXTS

4 A.L.R. 2d 392 6

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PREFATORY STATEMENT

We deem the statement of facts contained in petitioner's brief to be substantially conclusory. We, therefore, deem it necessary to set forth a complete statement of ultimate fact, even though it may be to some extent repititious. The references to the record are to the folio not the page, since that state record has been filed in this court and is not presently available to respondent.

SUPPLEMENTAL STATEMENT

At the time the grand jury proceedings initially were commenced, two investigators, Kechter and Hawley, were present (R., f. 31). The two investigators were introduced to the grand jury and introduced as being available to assist the grand jury (R., f. 34). The grand jury was instructed by the court that witnesses were to appear before the grand jury singly and without the presence of any other person except the district attorney and one assistant (R., f. 52). The investigators were present at the time the grand jury was ordered into session, which occured within the view of the court.

The petitioner, Clarence Smaldone, pursuant to subpoena, appeared before the grand jury. The petitioner gave his name and was asked if he had the nickname "Chauncey". Petitioner refused to answer. The district attorney then asked, "Do you intend to make that same response to all questions that I ask you?" The petitioner likewise refused to answer based upon his privilege against self-incrimination. The petitioner then gave his address and refused to answer the remaining questions. The remaining questions in substance were, are you married; were you at home on the evening of August 6, 1963. The district attorney then said he would ask some questions which were obviously not incriminating, to determine how contemptuous the petitioner was. These remaining questions were in substance, how old are you; are you married; do you have children; what is your business or occupation; and do you have any brothers and sisters. As to all of these questions, the petitioner persisted in his refusal to answer. The petitioner was directed to appear before the

court in the morning for determination as to whether his conduct constituted contempt. (See R., Exhibit B).

The witness appeared before the court at 9:10 A.M., Friday, August 30, 1963. Petitioner's counsel requested a continuance until 1:30 in the afternoon, which was granted (R., f. 84). At the afternoon hearing, petitioner's counsel made a second request for continuance, which was granted until September 3, 1963 (R., f. 87). The basis for the request was that counsel needed additional time to prepare.

Petitioner next appeared before the court at 9:50 A.M., Tuesday, September 3, 1963. At the commencement of the hearing, the trial court directed the exclusion of all persons who had no direct connection with the case, to which direction petitioner interposed no objection. Initially, the district attorney stated to the trial court that the purpose of the hearing was to determine whether the refusal to answer was proper, if not, to order the petitioner to answer and, upon continued refusal, to hold him in contempt (R., f. 91). The court directed the reporter to read the questions and answers, which was accomplished (R., f. 91). The court next asked the petitioner whether, if he were directed to answer these questions before the grand jury, at this time, "would your answers be the same?" The petitioner answered in the affirmative (R., f. 92). The court then ruled that failure of a person to respond to non-incriminating questions upon direction of the court constituted contempt (R., f. 95). This being the case, the court found the petitioner in contempt (R., f. 95).

ARGUMENT

We will respond to the questions presented in the same order set forth by petitioner.

> *"The Witness Was Never Given A Clear-cut Choice In That He Was Never Ordered By The Court To Answer Any Question."*

This "question presented" is difficult to respond to, since it is not supported by ultimate fact, but only by petitioner's self-serving conclusion.

A cursory review of the ultimate facts reveals the pellucid dissimilarity between this case and *Quinn v. U. S.*, 349 U. S. 155, 99 L.Ed. 964, 75 S.Ct. 668 (1954), relied on by petitioner, assuming, arguendo, that its teachings are applicable to state proceedings.

After continued adherence to the blanket refusal to respond to any questions before the grand jury, petitioner was directed to appear before the district court for determination as to whether his conduct constituted contempt. When such hearing was held, after two continuances at the request of petitioner's counsel, the district attorney stated to the court that the purpose of the hearing was to determine whether or not the petitioner's blanket refusal to answer was proper; and if it was not, he requested the court to direct the witness to respond and, upon continued refusal, that the court hold petitioner in contempt. The court inquired of the petitioner whether, if he were directed to answer the questions before the grand jury at that time, would his answer be the same. The petitioner responded that he adhered to his blanket refusal. The

court then ruled that the failure of a person to respond to non-incriminating questions upon direction of the court constituted contempt.

The choice between compliance and non-compliance, and thereby risking appropriate punishment for non-compliance, could not be more "clear-cut."

"The Witness Was Never Advised Of His Rights While In The Grand Jury Room."

The relevancy of this point to the judgment of contempt under consideration is obscure. We are not here concerned with a criminal proceeding based in whole or part upon inculpatory testimony of the petitioner before a grand jury. Since petitioner fails to develop, argue, or support this "question" or otherwise frame it as a justiciable issue, we treat it in the same manner. More elemental is the fact that this issue was at no time presented to the trial court, and is therefore not properly before this court for the reason stated in our response to question four.

"The Witness Was Interrogated Before The Grand Jury In The Presence Of Prosecution Investigators Who Were Not Sworn And Whose Presence Was Unauthorized"

This "question" is equally obscure to the instant case. Firstly, although the presence of the investigators was not specifically ordered, it cannot be said, under the circumstances presented, that their presence was "unauthorized". Assuming, arguendo, that their presence was "unauthorized", what legal effect does such fact have on the judg-

ment of contempt? The only known legal effect is in support of a motion to quash the indictment when an unauthorized person is present during the taking of evidence and deliberations of the grand jury which results in the return of an indictment. Such is the minority rule. The better reasoned rule is that the presence of an unauthorized person under such circumstances, when the person is a public officer, does not nullify the indictment unless prejudice is shown. See annotation 4 ALR 2d 392. In no event does such fact nullify or destroy the jurisdiction or authority of the grand jury, which is the only legal result which would grant petitioner refuge in the instant case. Repetitiously, this question was not in any manner presented to the trial court.

> *"The Witness Was Subjected To Summary In Camera Proceedings In Which The Court Did Not Discuss The Nature Of Any Specific Question Asked By The Grand Jury And Imposed A Contempt Sentence Without Making Any Order Directing The Witness To Answer."*

In support of the fourth question, petitioner relies wholly on this court's decision in *In Re Oliver,* 333 U. S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948). The nature of the proceedings which incurred the umbrage of this court in *Oliver* was a grand jury proceedings which transformed into criminal proceedings instanter without benefit of counsel, knowledge of the nature of the charges, or basis thereof, right of confrontation or right to present evidence. Added to this was the refusal to supply a verbatim transcript of the grand jury proceedings resulting in the judgment of contempt. None of these factors exist in this case. Although alluding to the right of public hearing, as in-

dicated by this court, it was not called upon to determine the nature or extent of a person's right to a public trial in a state proceeding. Nor is this court called upon to so define in this case.

In Colorado, the extent of the right to a public hearing is clearly delineated. Indiscriminate exclusion of the public is prohibited. *Thompson v. People,* ..... Colo. ....., 399 P.2d 776 (1965). It goes without question, however, that such right may be waived by failure to object to the court's exclusionary order. *Benedict v. People,* 23 Colo. 126, 46 P. 437 (1896). In addition, failure to object forecloses review by the Colorado Supreme Court on writ of error. *Phelps v. People,* 152 Colo. 467, 382 P.2d 995 (1963); *Parrott v. People,* 144 Colo. 587, 357 P.2d 634 (1960); *Davis v. People,* 112 Colo. 452, 150 P.2d 67 (1944). The "question presented" was not properly before the Colorado Supreme Court, and it is, therefore, not justiciable in this court on certiorari, since no judgment of denial exists for review by this court. Additionally, since the question presented was properly not passed upon by the Colorado Supreme Court, the judgment is supported by an independent non-federal basis. *Cramp v. Board of Public Instruction,* 368 U. S. 278, 7 L.Ed. 2d 285, 82 S.Ct. 275 (1961).

CONCLUSION

As to the first question presented, the decision of the Colorado Supreme Court is in harmony with the pronouncements of this court. The second and third questions raise no relevant legal issue. The fourth question is adversely disposed of on an independent non-federal ground. The petition for a writ of certiorari must be denied.

Respectfully submitted,

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